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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

NELSON BACALLAO and

STEPHEN FROMM,

Petitioners,

vs

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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24 pp

I

QUESTIONS PRESENTED FOR REVIEW

1) DID THE THREE-JUDGE PANEL OF THE NINTH CIRCUIT COURT OF APPEALS APPLY THE WRONG STANDARD OF REVIEW - SOUND DISCRETION AS OPPOSED TO STRICT SCRUTINY.

2) CAN THE DISTRICT COURT DECLARE A MISTRIAL, AS OPPOSED TO DISMISSAL WITH PREJUDICE, ONLY TO AVOID THE DOUBLE JEOPARDY BAR TO A SECOND TRIAL.

3) UNDER DOUBLE JEOPARDY ANALYSIS, CAN MANIFEST NECESSITY EXIST WHERE THE GOVERNMENT MAINTAINS AT TRIAL AND ON APPEAL THAT THE DISTRICT COURT'S SUA SPONTE DECLARATION OF MISTRIAL WAS NOT MANIFESTLY NECESSARY.

II

LIST OF PARTIES IN APPELLATE COURT

NELSON BACALLAO,

STEPHEN FROMM,

ISMAEL FELIPE ARNAIZ,

RAUL RODRIGUEZ, and

ALFREDO MOYA,

Appellants,

UNITED STATES OF AMERICA,

Appellee.

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REFERENCE TO OPINIONS OF LOWER COURTS

The unpublished opinion of the Ninth Circuit Court of Appeals, the order denying defendant's petition for rehearing, also in the appellate court, and the district court's order denying defendant's motion to dismiss the indictment and motion for reconsideration are reproduced in the Appendix.

VI

JURISDICTIONAL STATEMENT

The judgment of the Ninth Circuit Court of Appeals was entered on January 5, 1987, affirming the January 13, 1987, denial of defendant's motion to dismiss. The Court of Appeals denied the timely petition for rehearing on April 14, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

VII

CONSTITUTIONAL PROVISION

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states:

"[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

No.

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NELSON BACALLAO and

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vs

UNITED STATES OF AMERICA,

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NELSON BACALLAO and STEPHEN FROMM, Petitioners herein and Appellants and Defendants in the courts below, submit this Petition for Writ of Certiorari, in accordance with Rule 21 of the Supreme Court Rules.

VIII

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States District Court for the District of Arizona.

References herein shall be made to the Docket Number of papers filed in the district court, designated as "CR" and to the transcript record (month, date, year and page number) of the trial and hearing on the motion to dismiss, designated as "RT."

In this Statement of the Case, "Petitioners" and "Defendants" shall be used interchangeably.

The Petitioners, Nelson Bacallao and Stephen Fromm, and twenty two other individuals were indicted by a federal grand jury in the District of Arizona on March 20, 1984 for various narcotics-related and currency violations. (CR 1).

Defendants Bacallao and Fromm were charged in only two counts. (CR 1).

The indictment alleged the existence of a large narcotics importation and distribution conspiracy spanning four years. (CR 1). Trial commenced on April 2, 1985, in the United States District Court for the District of Arizona before the Honorable Richard Bilby.

Part of the government's argument and proof was that there was a connection between two alleged narcotics organizations: one, which was called the Barona group which was the subject of an investigation by Marion County, Florida, Sheriff Deputy Patty Lumpkin; and, two, the Arnaiz group of which co-defendant Luis Villageliu was allegedly a member. Both Barona and Mr. Villageliu were known as Mr. B.

Davidson later established that the two Mr. B organizations were completely separate and that the "Frank" in Tucson was Frank Pogliani, Hector Barona's right-hand man. (RT

5/4/85 46). Davidson prepared an investigative report on the Luis Villageliu meeting and organization which Sheriff's Deputy Patty Lumpkin of Marion County, Florida used to obtain a wiretap on Hector Barona, Sr. in the State of Florida. (RT 5/4/85 65-69). Neither Davidson, nor the government in any capacity, offered the report which contained this false information to defense counsel. In fact, only through a separate investigation on the part of Frank Rubino, counsel for Bacallao at the trial level, did the mishap come to light. (RT 5/4/85 75; RT 5/1/85 65).

On May 4, 1985, Deputy Lumpkin testified to explain the two Mr. B's situation and the fact that a wiretap was authorized based on an affidavit she prepared using false information provided by case agent Davidson. (RT 5/4/85 71-131).

Harold Davidson testified on May 1 and May 2. On May 1, on cross-examination by counsel for Defendant Arnaiz, Davidson

testified that he was not aware of the details surrounding the killing of two people by Larry Bridges, the government's main informant. (RT 5/1/85 71; RT 5/2/85 5).

On May 4, 1985, Deputy Lumpkin mentioned that Davidson, "within the last thirty days" called her to explain some confusion surrounding the killings. (RT 5/4/85 123). Only through subsequent re-examination of Lumpkin on May 15 did counsel for the Defendants and the district court learn that Davidson called Lumpkin on the night of May 1 during the middle of cross-examination of the case agent. (RT 5/15/85 12-13).

On May 13, 1985, the trial judge dismissed the case against co-defendant Gregory Clifford after the court discovered that the F.B.I. "obliterated" the sequestration rule. (RT 5/13/85 88-89). Defense counsel moved to dismiss the case against all remaining defendants, due to the prosecutorial misconduct. (RT 5/13/85 56, 78, 114). The trial judge, in

responding to counsel for Defendant Arnaiz's request to specifically admonish Davidson and the remaining government witnesses concerning the Rule, stated that they needed no warning, and if one more Rule violation were discovered, the case would be dismissed against all remaining defendants, with prejudice. (RT 5/13/85 106).

On May 16, the egregious nature of case agent Davidson's Rule violation, his withholding of crucial Brady material, and the F.B.I.'s withholding and late disclosure of Brady material (the F.B.I. had reports describing co-defendant Raul Rodriguez as a person "obviously not the man in the courtroom") caused the trial judge to terminate the case. (RT 5/15/85, 275, 278, 280, 283, 285, 291, 321). The trial judge specifically found violations of Brady and the Rule and declared a mistrial. (RT 5/16/85 2, 3).

Defendants moved for dismissal of the case with prejudice as the trial judge had

indicated would occur (RT 5/13/85 56, 78, 114; RT 5/14/85 43; RT 5/15/85 307, 313, 314) and objected to the granting of a mistrial. (RT 5/16/85 6, 11).

At the January 13, 1986, hearing on Defendants' motion to dismiss the indictment based on double jeopardy grounds, the trial judge stated that on May 16, 1985, there was "manifest necessity" to grant the mistrial. (RT 1/13/86 27, 28).

At this hearing, the government argued that there was no "manifest necessity" to declare the mistrial.

On appeal, a three-judge panel of the Ninth Circuit Court of Appeals affirmed the district court's order denying defendants' motion to dismiss the indictment based on double jeopardy grounds. The panel held that the trial judge properly exercised his "sound discretion" in finding "manifest necessity" and that the government's argument against a

declaration of mistrial supported the trial judge's decision.

IX

REASONS FOR GRANTING THE WRIT

The appellate court decision affirming the district court's order denying petitioners' motion to dismiss the indictment based on double jeopardy grounds conflicts with decisions of other federal courts of appeals on the same matter, with decisions of this Court, and sanctions such a departure by the district court, as to call for an exercise of this Court's power of supervision.

A. THE DISTRICT COURT CANNOT DECLARE A MISTRIAL, AS OPPOSED TO DISMISSAL WITH PREJUDICE, ONLY TO AVOID THE DOUBLE JEOPARDY BAR TO A SECOND TRIAL.

The three-judge panel of the Ninth Circuit ignored Petitioners' argument that the trial court erred in declaring a mistrial, as opposed to a dismissal with prejudice, and this oversight constitutes a clear abuse of discretion.

Six weeks after the trial commenced, the trial judge dismissed the charges against co-defendant Gregory Clifford after the court determined that agents from the Federal Bureau of Investigation involved in the case somehow discussed the case among themselves in violation of the rule against sequestration of witnesses. (RT 5/13/85 55). Petitioners contemporaneously demanded dismissal of their charges. The trial judge denied these motions but stated that he would dismiss the case with prejudice as to all defendants if one more violation of the sequestration rule was discovered. (RT 5/13/85 106). Two days later the trial court discovered that case agent Harold Davidson discussed the case during the middle of his cross-examination with another witness, Deputy Patty Lumpkin, and that this constituted a serious violation of the sequestration rule. At the same time, the trial judge discovered numerous government violations of Brady v. Maryland, 373 U.S. 83

(1963), which requires the government to disclose evidence favorable to the accused. Petitioners repeatedly requested that the trial court take the course of action the court stated it would take should any more government violations occur, namely, dismissal of the case with prejudice. (RT 5/15/85 307, 309, 313, 314, 318). The trial court sua sponte declared a mistrial just prior to sending the case to the jury.

The critical question in determining the impact of an order terminating trial does not turn on whether the district court labels its action a "dismissal" or a "declaration of mistrial" but whether the order contemplates an end to all prosecution of the defendant for the offense charged. Lee v. United States, 432 U.S. 23, 30 (1976). In the trial of this cause, the trial court set the stage for a dismissal with prejudice, but when the curtain call came, the trial judge declared a mistrial. The Petitioners consciously sought a

dismissal with prejudice, as opposed to a mistrial and its concomitant implications of a second trial. (RT 5/13/85 49, 56, 78, 114; 5/14/85 10 (co-defendant MOYA), 43).

The trial court's sua sponte declaration of mistrial just prior to a jury verdict in this situation is functionally indistinguishable from a dismissal with prejudice. Lee v. United States, 432 U.S. at 29. As the Ninth Circuit totally ignored this portion of Petitioners' argument, this Court must grant this request for certiorari so that Petitioners will have an audience to debate this travesty of justice.

B. THE THREE-JUDGE PANEL OF THE NINTH CIRCUIT COURT OF APPEALS USED THE WRONG STANDARD OF REVIEW - SOUND DISCRETION AS OPPOSED TO STRICT SCRUTINY

The Ninth Circuit misapplied the teachings of this Court in United States v. Jorn, 400 U.S. 470 (1971) and contrived a new standard of review in examining a trial judge's declaration of mistrial. At page 4 of

the Ninth Circuit's memorandum decision (page 6 in the Appendix), the appellate court held: "Along the spectrum of trial problems that may warrant a mistrial, the difficulties that gave rise to the mistrial in this case fall within an area in which the trial judge is entitled to exercise his sound discretion. See United States v. Jorn, 400 U.S. 470, 485-487 (1971) (plurality opinion), modified on other grounds, Oregon v. Kennedy, 456 U.S. 667, 672-78 (1982)." However, the actual language in Jorn to which the Ninth Circuit refers does not describe a degree of deference a reviewing court applies to a declaration of mistrial over a defendant's objection, nor does it describe a degree of deference or latitude a trial court is entitled to deciding whether a mistrial is manifestly necessary.

The pertinent language in United States v. Jorn states: "When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that

the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial." Jorn, 400 U.S. at 487. Thus, "sound discretion" refers to the quantum of discretion a trial judge is required to exercise before declaring a mistrial. Manifest necessity stands as a command to trial judges not to foreclose the defendant's option whether or not to take the case from the jury until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. Jorn, 400 U.S. at 485 (emphasis added); see also United States v. Perez, 9 wheat. 579, 580 (1824) ("To be sure, the power [to exercise sound discretion] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes").

The Ninth Circuit correctly restated the two levels of appellate review - great deference when the grounds for mistrial relate to juror prejudice, and strict scrutiny where the accused claims the mistrial was caused by government misconduct. The appellate court inappropriately contrived a third level of review - sound discretion - where no other court in this nation has ever mentioned such a standard of judicial review. The Ninth Circuit's adoption of the "sound discretion" standard was critical to its decision affirming the trial court's finding of manifest necessity. The Ninth Circuit held at page 4 of its memorandum decision (page 6 of the Appendix): "Although the matter is not free from doubt, we find that the requisite manifest necessity existed in this case."

In the appellate court, the Petitioners claimed that strict scrutiny was the appropriate standard of review. The trial judge declared a mistrial in this case because of

government misconduct. When the accused claims that the mistrial was intentionally caused by the prosecution, the trial judge's declaration of mistrial should be strictly scrutinized. Arizona v. Washington, 434 U.S. 497, 507-510 (1977).

This Court must exercise its supervisory power to ensure that no federal court of appeals, including the Ninth Circuit, adopts the sound discretion standard of review.

C. UNDER DOUBLE JEOPARDY ANALYSIS, MANIFEST NECESSITY CANNOT EXIST WHERE THE GOVERNMENT MAINTAINS AT TRIAL AND ON APPEAL THAT THE DISTRICT COURT'S SUA SPONTE DECLARATION OF MISTRIAL WAS NOT MANIFESTLY NECESSARY.

The Ninth Circuit affirmed the trial court's finding of manifest necessity for the declaration of mistrial. The government at trial, at the hearing on the motion to dismiss, and on appeal maintained there was no manifest necessity for the court's mistrial declaration. However, it is axiomatic that "the government must establish that the

termination (of trial) was occasioned by 'manifest necessity' in order to avoid the Fifth Amendment double jeopardy bar to reindictment and retrial." United States ex rel. Clauser v. McCevers, 731 F.2d 423, 426 (7th Cir. 1984) (emphasis added).

"Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's 'valued right to have his trial completed by a particular tribunal'." Arizona v. Washington, 434 U.S. 497, 503 (1978) (quoting United States v. Jorn, 400 U.S. 470, 484 (1971) (Brennan, J. concurring)).

> [Because] of the importance of [this] right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant. The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden.

Arizona v. Washington, 434 U.S. 497, 505 (1978) (footnote omitted).

Again, the Ninth Circuit ignored Petitioners' argument that the prosecutor could not meet his heavy burden of demonstrating manifest necessity if he consistently argues against any finding of manifest necessity. By so doing, the appellate court has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

X

CONCLUSION

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17. This is such a case. This Court's power of supervision represents the last opportunity for the vindication of

Petitioners' fundamental right against double jeopardy.

DATED: June 12, 1987.

Respectfully Submitted,

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XI
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari have been mailed by deposit with the United States Post Office, first class postage prepaid on this 12th day of June, 1987 to:

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No.

IN THE

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OCTOBER TERM 1987

NELSON BACALLAO and

STEPHEN FROMM,

Petitioners,

vs

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NOS.: 86-1036, 86-1035
86-1036, 86-1038
86-1075

D.C.: CR-84-0061-TUC-RMB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant.

-vs-

MEMORANDUM*

ALFREDO MOYA, RAUL ALFONSO RODRIGUEZ, ISMAEL FELIPE ARNAIZ, NELSON BACALLAO, STEPHEN FROMM,

Defendants-Appellants,
Cross-Appellees.
_____/

Appeal from the United States District Court
for the District of Arizona
R. M. Bilby, Chief District Judge, Presiding
Argued and Submitted November 10, 1986
San Francisco, California

Before: WRIGHT, SNEED, and KOZINSKI, Circuit Judges

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Five codefendants appeal the district court's denial of their motions to dismiss their indictments on double jeopardy grounds. In a companion case, the government appeals the district court's order regarding a sanction for a violation of the Jencks Act. We affirm the district court's grant of a mistrial rather than a dismissal and the district court's sanction order limiting testimony.

I

FACTS AND PROCEDURAL BACKGROUND

On March 20, 1984, the five codefendants and nineteen others were charged in a sixteen-count indictment. They were charged with various controlled substance and currency violations that stemmed from an alleged conspiracy to import and distribute cocaine, methaqualone, and marijuana. During the course of the trial, the district court found that the government violated the witness sequestration rule on three occasions. The

court also found that the government committed two violations of Brady v. Maryland, 373 U.S. 83 (1963), which requires the government upon specific request to disclose evidence favorable to the accused. The court concluded that the Brady violations "were probably just good faith mistakes," but that they were of the type that hurt the defense.

It further ruled that the government had violated the Jencks Act, 18 U.S.C. § 3500. The violation occurred in the following manner. The government attorney and a case agent took notes of an interview with Thomas Knoll. Knoll had entered into a plea agreement in which he agreed to cooperate with the government in two unrelated matters, and to discuss the instant case with the prosecutor. After an initial interview between Knoll and the government attorney, Knoll's attorney requested that a recording be made for Knoll's protection. The government attorney, going through his notes, summarized their previous

discussion on tape. Knoll stated that the attorney's summary was accurate. The notes of the interview were subsequently lost. Later, Knoll agreed to testify in the instant case. The district court ruled that Knoll had, in the recording, adopted the notes as his statement within the meaning of the Jencks Act. The judge sanctioned the government by limiting Knoll's testimony to items covered in the recording. The government appeals this sanction order.

On May 16, 1985, the district court sua sponte granted a mistrial because of manifest necessity. In a minute order, the court cited government violations of Brady, the Jencks Act, and the witness sequestration rule as reasons for declaring the mistrial. At a hearing on January 13, 1986, the court stated that defense counsel misconduct contributed to the mistrial decision. After the declaration of a mistrial, the defendants moved for

dismissal on grounds of double jeopardy. The court denied their motion, and they appealed.

II

DISCUSSION

A. Double Jeopardy

In a jury trial jeopardy attaches when the jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28, 29 (1978). However, reprosecution is not barred if the trial was terminated because of "manifest necessity." Arizona v. Washington, 434 U.S. 497, 505 (1978). The "words [manifest necessity] do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge." Id. at 506. The Court has stated that there are "degrees of necessity," id. at 506, and that the degree of deference to be given the trial judge's declaration of a mistrial varies according to the circumstances of each case, id. at 507-10. On the one hand,

decisions where the accused claims the mistrial was intentionally caused by the prosecution are strictly scrutinized; on the other hand, a trial judge's decision that a mistrial is required because of a deadlocked jury or possible juror bias is given great deference. Id. at 507-11; see United States v. Jarvis, 792 F.2d 767, 769 (9th Cir.), cert denied, 107 S. Ct. 182 (1986). This case falls somewhere between these two ends of the spectrum. Along the spectrum of trial problems that may warrant a mistrial, the difficulties that gave rise to the mistrial in this case fall within an area in which the trial judge is entitled to exercise his sound discretion.[1] See United States v. Jorn, 400 U.S. 470, 485-87 (1971) (plurality opinion), modified on other grounds, Oregon v. Kennedy, 456 U.S. 667, 672-78 (1982).

Although the matter is not free from doubt, we find that the requisite manifest necessity existed in this case. The district

judge found that the violations of both Brady and the witness sequestration rule, although probably good faith mistakes, affected the defense lawyers' ability to defend their clients, and that there was no way he could cure the resulting prejudice. Under these circumstances the judge exercised sound discretion in declaring a mistrial.

The defendants understandably insist that they should not be retried because government misconduct was the primary cause of the mistrial. The Supreme Court, however, has refused to provide the shield of double jeopardy when a mistrial is due to mistakes of the government, United States v. Jorn, 400 U.S. at 486, except when the declaration of mistrial was "on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation," Illinois v. Somerville, 410 U.S. 458, 464 (1973). Given the absence of intentional prosecutorial misconduct and the prosecutor's plea for the

case to go to the jury, we conclude the prosecutorial lapses do not lend themselves to "prosecutorial manipulation." We hold that the declaration of a mistrial rather than a dismissal was proper.

We also note that the conduct of some of the defense attorneys, although not cited as a ground for the court's declaration of a mistrial until nine months after the mistrial was granted, was unprofessional, to say the least. The record reveals that, on approximately thirty occasions, the prosecutor complained to the trial court of the heckling by certain defense counsel during the prosecutor's arguments to the court. We emphatically disapprove of the misconduct of certain defense counsel in this case. Attorneys of defendants charged with crimes have a great stake in maintaining the fairness of trials; they cannot expect that society will long tolerate trials generally unfair to the state.

Defense counsel misconduct contributed to the manifest necessity for a mistrial.

B. Sanction Under Jencks Act

The government raises two issues on appeal from the Jencks Act sanction. It argues, first, that the prosecutor's notes, taken during the interview, were never adopted by the witness and thus do not constitute Jencks Act material. The government also argues that even if the notes were Jencks Act material, the sanction for the government's violation of the Jencks Act constitutes an abuse of discretion. We have jurisdiction under 18 U.S.C. § 3731 to decide these issues because we find that retrial of the defendants would not violate the double jeopardy clause. See United States v. Layton, 720 F.2d 548, 553-54 (9th Cir. 1983), cert. denied, 465 U.S. 1069 (1984).

A trial judge's decision that interview notes are a witness's own statement is a question of fact. We should not disturb his

finding unless it is clearly erroneous. United States v. Goldberg, 582 F.2d 483, 486 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979), modified on other grounds, United States v. Shaffer, 789 F.2d 682, 687-88 (9th Cir. 1986). The standard of review employed with respect to most rulings on Jencks Act issues is abuse of discretion. United States v. Miller, 771 F.2d 1219, 1229 (9th Cir. 1985). That is also the standard for reviewing the imposition of sanctions. United States v. Valencia, 656 F.2d 412, 415 (9th Cir.), cert. denied, 454 U.S. 877 (1981).

The Jencks Act defines a "statement" as "a written statement made by [a] witness and signed or otherwise adopted or approved by him." 18 U.S.C. § 3500(e)(1). The Supreme Court has held "statements" of a witness that are written by a government attorney are within the scope of the Jencks Act. Goldberg v. United States, 425 U.S. 94, 98 (1976).

Thus the notes can be a "statement" under 18 U.S.C. § 3500(e)(1).

Although the prosecutor's notes were not signed by Knoll, the trial judge ruled that Knoll had "otherwise adopted these notes. It was not error to so rule. In determining whether a statement has been adopted by a witness it is important to ascertain whether the notes were read back to the witness. United States v. Goldberg, 582 F.2d at 487. Here, the recording consisted of the government attorney doing precisely that.

The district court sanctioned the government by limiting Knoll's testimony to items contained in the tape. The government argues that the sanction is unduly harsh because the loss of the notes was unintentional, and the status of Knoll as a witness was unanticipated at the time of the interview.

The Jencks Act authorizes the trial judge to strike the testimony of a witness when the government elects not to comply with an order

of the court. 18 U.S.C. § 3500(d). The court is required, in making its decision whether to strike a witness's testimony, to consider the culpability of the government and the injury resulting to the defendants. United States v. Sterling, 742 F.2d 521, 524 (9th Cir. 1984), cert. denied, 105 S. Ct. 2322 (1985). The trial judge in this instance considered the lack of government culpability and lack of prejudice to the defendants and then imposed a sanction less harsh than that authorized by the Jencks Act. His ruling was not an abuse of discretion. We therefore affirm the district court's order limiting Knoll's testimony to the subjects covered in the tape-recorded statement.

AFFIRMED.

FOOTNOTE

1. The "sound discretion" standard has its origins in Mr. Justice Story's classic formulation of the test for manifest necessity. See United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NO.: 86-1036

UNITED STATES OF AMERICA,
CR-84-061

Plaintiff-Appellee,

-vs-

ALFREDO MOYA, RAUL ALFONSO RODRIGUEZ, ISMAEL FELIPE ARNAIZ, NELSON BACALLAO, STEPHEN FROMM,

Defendants-Appellants,
_____/

D.C.:
TUC-RMB

ORDER

FILED
April 14, 1987

C.A. Catterson
Clerk
U.S.Court of
Appeals

Before: WRIGHT, SNEED, and KOZINSKI, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. p. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

D.C.: CR-84-061-TUC-RMB

UNITED STATES OF AMERICA,

Plaintiff,

-vs- ORDER

ISMAEL FELIPE ARNAIZ,

Defendants.
_____/

Counsel for the Defendants have urged upon the Court that it reconsider its ruling denying their Motion to Dismiss on the basis of double jeopardy. They claim that their review of the record after the hearing on January 13, 1986 shows the Court had entered an Order on May 13, 1985, that if it found any additional violations of the rule, it would dismiss the counts as to all of the Defendants. They specifically point to the language of the Court on Page 106, May 13, 1985, and the findings of the Court on May 16, 1985,

that there had been a rule violation involving Deputy Lumpkin.

After reviewing the transcripts in question and refreshing its memory, the Court denies the Motion for Reconsideration. What counsel say is true, the Court was very agitated on the 13th, and stated that if there was an additional violation of the rule, it would dismiss the case. No new violations occurred after that time. However, it was brought to the Court's attention that an additional violation had occurred prior to May 13, 1985, but was not discovered until after May 13, 1985, when it was brought to the Court's attention. Based on this, the Court determined that there was a manifest necessity for declaring a mistrial, but decided not to dismiss the case for two reasons: 1) the violation of the rule had not occurred after May 13, 1985, and 2) the broad, open file policy of the United States Attorney's Office in Tucson indicated that the prosecutor had

done nothing improper, and had made a good faith effort to comply with Jencks, Brady, and the rule of the Court. In each instance, the violations occurred by the investigative agencies, FBI, DEA, and the Miami Police Department. Under all these circumstances, the Court felt, and still feels that there was a manifest necessity for declaring a mistrial, but that a dismissal was too harsh a remedy under all of the circumstances of the case.

DATED this 14th day of January, 1986.

Richard M. Bilby, Judge
United States District Court

(1) (2)

Nos. 86-1842 and 86-1998

Supreme Court, U.S.
FILED
JUL 28 1987
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

ISMAEL FELIPE ARNAIZ, PETITIONER

v.

UNITED STATES OF AMERICA

NELSON BACALLAO AND STEPHEN FROMM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the district court properly declared a mistrial because of improprieties committed by the government and the defense.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1842

ISMAEL FELIPE ARNAIZ, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (86-1998 Pet. App. 1-13) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1987. A petition for rehearing in No. 86-1842 was denied on March 5, 1987, and the petition in that case was filed with this Court on May 4, 1987. A petition for rehearing in No. 86-1998 was denied on April 14, 1987, and the petition in that case was filed with this Court on June 12, 1987.

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[1] "Pet. App." refers to the appendix to the petition in No. 86-1998 unless otherwise indicated.

STATEMENT

In an indictment returned in the United States District Court for the District of Arizona, petitioners and 21 co-defendants were charged with various controlled substance and currency violations. The charges related to petitioners' participation in a conspiracy to import and distribute cocaine, methaqualone, and marijuana. All three petitioners were charged with conspiracy to import those substances, in violation of 21 U.S.C. 963, and conspiracy to distribute them, in violation of 21 U.S.C. 846. Additionally, petitioner Arnaiz was charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. (& Supp. III) 848; two counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); interstate travel to promote a narcotics business, in violation of 18 U.S.C. 1952; two counts of using a telephone to facilitate the commission of a narcotics offense, in violation of 21 U.S.C. 843(b); failure to file a currency transaction report, in violation of 31 U.S.C. 5313; and conspiracy to defraud the Internal Revenue Service, in violation of 18 U.S.C. 371.

1. At the trial of petitioners and six of their co-defendants the government presented evidence that, between May 1980 and March 1984, petitioners and their co-defendants participated in a large-scale conspiracy to import cocaine, marijuana, and methaqualone into the United States and to distribute those substances.[2] Petitioner Arnaiz was alleged to be the ringleader of the operation, and co-defendants Moya and Rodriguez were alleged to be his lieutenants. One of petitioners' principal defenses was that the evidence failed to demonstrate the existence

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[2] Two of the co-defendants, Alfredo Moya and Alfonzo Rodriguez, have previously filed petitions for a writ of certiorari, which are now pending before the Court. See *Moya* v. *United States*, No. 86-6591; *Rodriguez* v. *United States*, No. 86-6637.

of the broad conspiracy charged in the indictment. At most, the defense maintained, the evidence showed that various defendants participated in smaller importation conspiracies during the relevant period and that, as the result of an October 22, 1981, dispute, a group of the defendants severed their ties with the Arnaiz organization and engaged in their own drug smuggling activities.

As part of its case, the government presented evidence that in May 1982, Rodriguez and several others flew from Florida to Arizona to find landing strips to use in connection with petitioner Arnaiz's smuggling operations (5/1/85 Tr. 17-31). The defense maintained that those activities were not conducted on behalf of the Arnaiz organization but on behalf of a separate narcotics-smuggling organization run by one Hector Barona.

Shortly before the trial was to conclude, the prosecutor produced an affidavit that a Marion County, Florida, sheriff's deputy had executed in connection with a wiretap application for Barona's telephone. The affidavit, which had been in the possession of the DEA agent conducting the investigation, stated that the Florida sheriff's investigation had revealed that on May 13, 1982, Jay Betencourt, an employee of Barona's, met with Rodriguez and others in Tucson, Arizona, for the purpose of locating a suitable airstrip in southern Arizona to use for importing drugs (5/15/85 Tr. 195-196). The district court found that the failure to furnish the affidavit to the defense constituted a violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), because the affidavit suggested that the participants in the expedition were involved with the Barona organization rather than the Arnaiz organization. The court concluded, however, that the violation was not committed in bad faith, since the prosecutor had not been aware of the existence of the document earlier (5/15/85 Tr. 283-285; 5/16/85 Tr. 1-3).

The trial court also found that a second *Brady* violation had occurred as a result of the government's failure to furnish the defense, prior to the last day of trial, with an FBI report reflecting that an informant had described co-defendant Rodriguez in a manner inconsistent with his actual appearance (5/15/85 Tr. 280-282). Again, however, the court concluded that the violation was "probably just [a] good faith mistake[ ]" (Pet. App. 3).

In addition to the *Brady* violations, the trial judge ruled that the government had violated the Jencks Act, 18 U.S.C. 3500, as a result of its failure to furnish the defense with a tape-recorded summary of an interview with a government witness. Prior to trial, that summary had been lost. Pet. App. 3-4.

Finally, the trial judge found that, on several occasions, government witnesses violated the court's sequestration order by discussing their testimony with other witnesses. One incident, which resulted in the dismissal of charges against co-defendant Gregory Clifford, occurred when FBI agents, who had been called to testify on Clifford's behalf, discussed their testimony among themselves (5/13/85 Tr. 11-26, 105-106). Another incident occurred when, following his testimony, the DEA case agent telephoned the Marion County, Florida, deputy sheriff who executed the wiretap affidavit. The DEA agent informed the deputy sheriff that she would probably be questioned concerning information contained in the affidavit. He also told her that, while he was being cross-examined by the defense, he had learned that a government informant may have murdered two Americans in Mexico (5/15/85 Tr. 204, 208).

The violations of the trial judge's sequestration order and the failure to furnish *Brady* material prompted counsel for petitioners to move for dismissal of the charges (see, *e.g.*, 5/3/85 Tr. 4; 5/13/85 Tr. 66-67). Counsel for petitioner Bacallao repeatedly requested that, in the alternative, the district court declare a mistrial. He

stated that, "I move for a dismissal, but in the alternative, I now move for a mistrial. * * * I'd take a mistrial because I want[] a clean, untainted jury. Now I'm going to have a real mess on my hands. I want a new jury. * * * I want a jury who is going to hear untainted things." 5/13/85 Tr. 74; see *id.* at 75 ("I will gladly take a mistrial so I can come back here again"); *id.* at 107 ("[Y]ou've got to give me another jury, Judge"). Counsel for the remaining petitioners did not dissociate themselves from the mistrial requests even though the district court had stated at the outset of the trial that the motion of any defense attorney would be imputed to the co-defendants unless they indicated otherwise (4/18/85 Tr. 177).[3]

Ultimately, the trial judge granted the motions for a mistrial. He explained that the mistrial declaration was based upon the *Brady* and sequestration order violations (5/16/85 Tr. 2-4). Although counsel for petitioner Fromm stated that dismissal was the proper remedy, the remaining petitioners voiced no disagreement with the mistrial declaration (*id.* at 11).

Petitioners then filed motions to dismiss the indictment on double jeopardy grounds. The district court denied the motions following a hearing. Pet. App. 2-3. In the course of the hearing, the trial judge stated that he had declared the mistrial on the specific ground "that there was a manifest necessity" (*id.* at 2) to do it. He found the mistrial necessary because of the Jencks Act and *Brady* violations by the government and because of the improper communications between government witnesses. As an additional reason for the mistrial declaration, the court cited

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[3] Throughout the proceedings petitioners and their co-defendants repeatedly made motions for a mistrial (see Gov't C.A. Br. 25 n.5). During a post-trial hearing, the district court observed that the defendants "moved for more mistrials than a computer could keep track of" (*id.* at 22) and that "[t]here have been so many motions for mistrial, that after a while you become dulled to them" (1/13/86 Tr. 47).

repeated instances of improper comments and heckling by defense counsel, particularly counsel for petitioner Bacallao (1/13/86 Tr. 47-48). Summarizing his reasoning, the trial judge explained that "I just felt under the circumstances that in fairness to everybody, including both the Government and the defendants, that it was necessary to grant a mistrial" (1/13/86 Tr. 47-48).

2. The court of appeals affirmed. It held that although the matter was not free from doubt, the district court exercised sound discretion in declaring a mistrial on the basis of manifest necessity (Pet. App. 6). That action, the court reasoned, was warranted because of the district court's inability to cure the prejudice resulting from the government's *Brady* violations and the witnesses' failure to adhere to the sequestration order. In addition, the court observed that misconduct by defense counsel "contributed to the manifest necessity for a mistrial" (Pet. App. 9).

ARGUMENT

Petitioners contend (86-1842 Pet. 18; 86-1998 Pet. 16) that the district court abused its discretion by declaring a mistrial on the basis of manifest necessity and that, as a result, the Double Jeopardy Clause forecloses their retrial. That claim was properly rejected by the court of appeals and does not merit further review.[4]

In the first place, absent intentional misconduct by the government that is calculated to induce a mistrial, the Double Jeopardy Clause does not bar a retrial where the defendant elects to terminate the proceedings by requesting a mistrial. *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982). This principle applies not only where the defendant expressly requests a mistrial, but also where consent to the termination of the proceedings is implicit from the circum-

[4] The petitioners in Nos. 86-6591 and 86-6637 raised substantially the same issues. We reiterate the arguments that we made in our responses to those petitions.

stances or where the defense accedes to a mistrial declaration by failing to object. See, *e.g., United States* v. *Buljubasic,* 808 F.2d 1260, 1265 (7th Cir. 1987), petition for cert. pending, No. 86-1608; *United States* v. *Smith,* 621 F.2d 350, 352 (9th Cir. 1980), cert. denied, 449 U.S. 1087 (1981); *United States* v. *Gordy,* 526 F.2d 631, 635 n.1 (5th Cir. 1976); *United States* v. *Beckerman,* 516 F.2d 905 (2d Cir. 1975); *United States* v. *Goldstein,* 479 F.2d 1061, 1067 (2d Cir.), cert. denied, 414 U.S. 873 (1973).

Throughout the trial, petitioners repeatedly requested that the proceedings be terminated by a mistrial declaration. When the violation of the court's sequestration order by a government witness was revealed, counsel for petitioner Bacallao expressly requested a mistrial (5/13/85 Tr. 74-75). The other petitioners did nothing to dissociate themselves from that motion, although the trial judge had earlier stated that, absent an expression of disagreement, he would consider any motion of one defendant to be adopted by the rest. Additionally, when the trial judge announced that "the motion for a mistrial is granted," counsel for petitioners Arnaiz and Bacallao lodged no objection to the declaration, although counsel for petitioner Fromm argued that the court should have gone farther and dismissed the charges altogether (5/16/85 Tr. 11). No petitioner expressed the desire to continue with the trial before the jury that had been empanelled, rather than having a mistrial. Under these circumstances, where the defendants have sought or acquiesced in the mistrial, where no defendant has asked to have the trial continue before the same jury, and where there is no showing of any intentional governmental misconduct designed to goad the defense into seeking a mistrial, the Double Jeopardy Clause does not bar a retrial. See, *e.g., United States* v. *Buljubasic,* 808 F.2d at 1265.

Even if petitioners had not acquiesced in the mistrial

declaration,[5] the Double Jeopardy Clause still would not preclude a retrial. When a mistrial is required by manifest necessity, the Constitution's protection against double jeopardy does not bar a retrial, even if the defendant opposes the mistrial declaration. *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824). Moreover, because the trial judge is the "most familiar with the evidence and the background of the case on trial," his decision to declare a mistrial is entitled to great deference, and is not subject to reversal on appeal unless he acts "irrationally or irresponsibly." *Arizona* v. *Washington,* 434 U.S. 497, 514 (1978).[6]

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[5] Petitioners Bacallao and Fromm (86-1998 Pet. 8-10) maintain that, because the trial judge had earlier threatened to dismiss the case if there were further violations of the sequestration rule, his mistrial order, following a subsequent violation, was "functionally indistinguishable from a dismissal with prejudice," as opposed to a mistrial. The trial judge, however, made it plain that he did not intend to terminate the proceedings and that he contemplated that the defendants would be subject to retrial (5/16/85 Tr. 4-11). As the Court explained in *Lee* v. *United States,* 432 U.S. 23, 30-31 (1977), even if a court does not call its order a mistrial declaration, an order terminating a trial should be considered as such unless the order "contemplates an end to all prosecution of the defendant for the offense charged."

[6] Petitioners maintain (86-1842 Pet. 20; 86-1998 Pet. 10-14) that, because the government was responsible for the errors that triggered the mistrial declaration, the court of appeals erred in applying an abuse of discretion standard in assessing the propriety of the district court's order. As this Court explained in *Washington,* 434 U.S. at 513 (citation omitted), however, "[t]he adoption of a stringent standard of appellate review in this area * * * would seriously impede the trial judge in the proper performance of his 'duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop * * * professional misconduct.' " Nothing in *Washington* suggests that a deferential standard of review is inapplicable to cases involving improprieties on the part of the government, as long as the government's conduct is not calculated to harass or achieve a tactical advantage over the accused or to trigger the termination of the proceedings.

In this case, the trial judge determined that, in view of errors by government investigators, as well as misconduct by defense counsel, neither side could receive a fair trial. On the one hand, the court found that the belated disclosure of *Brady* and Jencks Act materials, coupled with the violations of the sequestration order, irreparably compromised the defendants' ability to pursue their defenses and to exploit material that could have impugned the veracity of government witnesses. On the other hand, the court determined that the government's right to a fair trial was infringed as the result of improper comments by defense counsel. Under these circumstances, a mistrial declaration, based upon manifest necessity, was well within the district court's discretion.[7] See, *e.g.*, *Arizona* v. *Washington, supra* (approving mistrial declaration based upon defense counsel's improper and prejudicial remarks during his opening statement).[8]

See *id.* at 508; see also *United States* v. *Jarvis*, 792 F.2d 767, 769 (9th Cir. 1986), cert. denied, No. 86-135 (Oct. 6, 1986) (strict scrutiny standard applies when the defense claims that the mistrial was *intentionally* caused by the prosecution). In this case, the courts below concluded that the government's errors were unintentional. See Pet. App. 7.

[7] Petitioners Bacallao and Fromm maintain (86-1998 Pet. 14-16) that the manifest necessity standard for a mistrial declaration should be inapplicable in this case as the government had argued at trial that manifest necessity did not require termination of the proceedings. But as the Court explained in *Washington*, 434 U.S. at 516 (footnote omitted), the determination whether to declare a mistrial on the basis of manifest necessity rests with the sound discretion of the trial judge and not the parties. "Neither party has a right to have his case decided by a jury which may be tainted by bias * * *."

[8] Petitioner Arnaiz maintains (86-1842 Pet. 22-24) that the decision of the court below is contrary to *United States* v. *Smith*, 621 F.2d 350 (9th Cir. 1980), cert. denied, 449 U.S. 1087 (1981), and *United States* v. *McKoy*, 591 F.2d 218 (3d Cir. 1979), which hold that, prior to declaring a mistrial on the basis of manifest necessity, the trial judge must consider reasonable alternatives. The trial judge did, however, consider and reject as insufficient less drastic alternatives before he

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1987

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declared the mistrial. He stated that, although he had been able to cure a sequestration order violation in another case by limiting a witness's testimony, he did not believe that such a remedy would be effective here (5/16/85 Tr. 3-4). In any event, as the Court emphasized in *Washington*, 434 U.S. at 511, the fact that other district courts might have selected a remedy short of a mistrial declaration is not a basis for finding that the district court in this case abused its discretion in determining that a mistrial declaration was the only remedy sufficient to assure a fair trial.

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